PS LA 2011/1 - ATO's Advance Pricing Arrangement Program

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Australian Taxation Office

Practice Statement Law Administration

PS LA 2011/1

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SUBJECT: **ATO's Advance Pricing Arrangement Program**

PURPOSE: **To explain the policies and procedures of the Advance Pricing Arrangement Program**

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STATEMENT

1. This practice statement is a comprehensive guide to the Australian Taxation Office's Advance Pricing Arrangement Program. It explains the principles and procedures of the Advance Pricing Arrangement (APA) Program to taxpayers, advisors and our staff.

2. This practice statement replaces Taxation Ruling TR 95/23 Income tax: transfer pricing – procedures for bilateral and unilateral advance pricing

arrangements. That Ruling provided guidance on the ATO's previous APA Program.

CHAPTER 1 – INTRODUCTION

Australia's transfer pricing rules

3. The purpose of Australia's transfer pricing rules is to ensure that for tax purposes taxpayers price their international related party dealings as truly independent parties would have done in the same situation. This is known as the arm's length principle.

4. The Organisation for Economic Co-operation and Development (OECD) and its members have recognised the significance of transfer pricing and agreed that the arm's length principle is the international transfer pricing standard that should be used for tax purposes. The arm's length principle uses the behaviour of independent parties as a guide or benchmark to determine the arm's length consideration or profits in relation to international related party dealings.

5. The Australian Taxation Office (ATO) must ensure that businesses operating in Australia declare a level of income from their international related party dealings[1] which is commensurate with the activities carried out in Australia, the assets used, and the risks assumed by the taxpayer. The ATO maintains an extensive transfer pricing program that involves a mixture of education and enforcement activities. The APA Program is part of the ATO's balanced program of advice and assurance.

Aim of the APA Program

6. The aim of the APA Program is to give taxpayers the opportunity to reach agreement with the ATO on the method of application of the arm's length principle to their international related party dealings on a prospective basis, thereby resolving any uncertainty around those dealings.

7. Taxpayers who require a level of assurance as to the ATO view of their transfer pricing risk without the cost and time associated with undertaking an APA have access to the ATO risk assessment and self assessment risk products (see Chapter 12).

What is an APA?

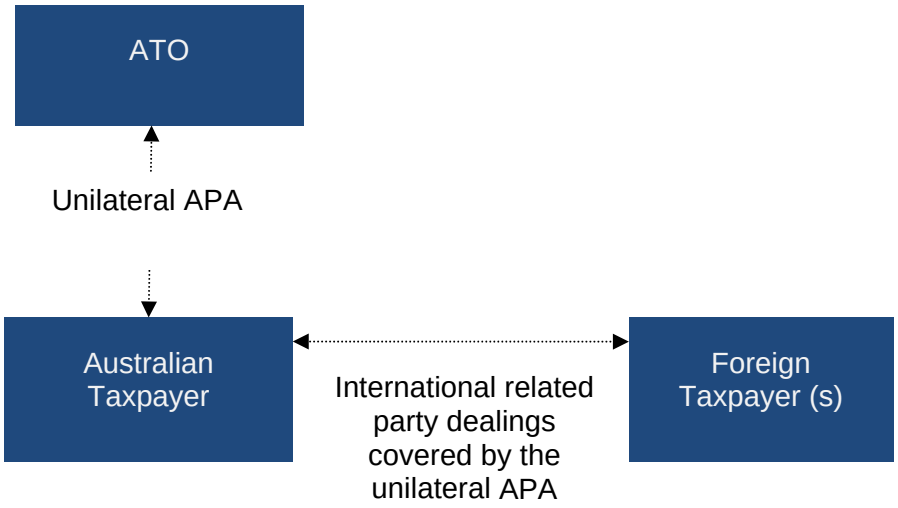
8. An APA is an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (for example, method, comparables and appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing of those transactions over a fixed period of time.[2]

9. An APA will generally apply for three to five years but may be longer, for example, where the covered international related party dealings continue for a period in excess of five years. An APA can be concluded either unilaterally, bilaterally or multilaterally.

[1] International related party dealings include any transactions, agreements or arrangements.
[2] Based on paragraph 4.123 of the *2010 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*.

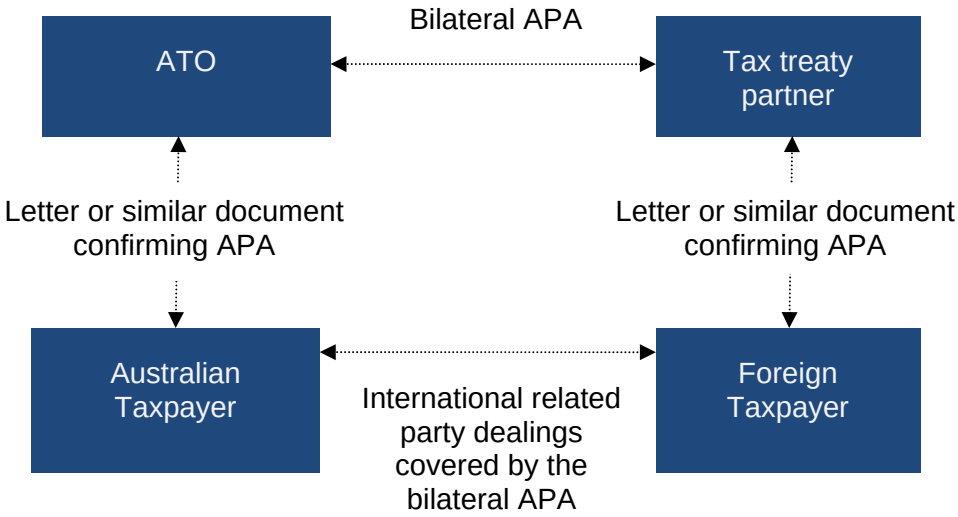
Unilateral APA

10. Where the APA process does not involve or require agreement with a tax treaty partner or involves a country with which Australia does not have a taxation treaty, the arrangement between the taxpayer and the ATO is referred to as a unilateral APA, as shown in the flowchart below. A unilateral APA is concluded between the ATO and a taxpayer under the Commissioner's power of general administration of the income tax legislation[3] and the taxpayer and ATO agree in writing to be bound by the terms of the APA. This does not guarantee the agreement of the tax treaty partner(s) and does not depend on that agreement or require it to be sought.



Bilateral APA

11. A bilateral APA is an arrangement between the ATO and a tax treaty partner concerning the transfer pricing of international related party dealings, as shown in the flowchart below. It is concluded under the Mutual Agreement Procedure (MAP) Article of the relevant taxation treaty. Each treaty partner confirms the terms of the APA in writing through a letter or similar document with their resident taxpayer and agrees to be bound by them. A bilateral APA therefore provides certainty for taxpayers that acting consistently with it will avoid double taxation.



[3] Section 8 of the *Income Tax Assessment Act 1936.*

Multilateral APA

12. A multilateral[4] APA is an arrangement between the relevant taxpayers, the ATO and more than one tax treaty partner and binds all its parties.

Assurance provided by an APA

13. Once the APA comes into effect and the taxpayer has agreed to and complies with its terms, the ATO is administratively bound by the terms of the APA. The APA may require the taxpayer to comply with particular requirements, and may depend on critical assumptions being met. If those requirements are complied with and those assumptions met, the Commissioner of Taxation is prevented from imposing any additional income tax on the covered international related party dealings than is payable on the pricing worked out under the APA.

14. There is potential for double taxation under a unilateral APA where a tax treaty partner forms a different view as to the application of the arm's length principle to the international related party dealings covered by the APA. The Australian Competent Authority[5] will seek to support the transfer pricing outcomes of the unilateral APA during Competent Authority discussions but may have to deviate from the transfer price under the original terms of a unilateral APA to arrive at a solution with the foreign Competent Authority.

Types of APA products

15. There are three different types of APA products: simplified, standard and complex. The most suitable product will be agreed in the pre-lodgment phase.

- The **simplified APA product** is designed for taxpayers with low value or low risk international related party dealings seeking to achieve greater tax certainty about transfer pricing for those dealings. The simplified APA process is less time consuming and less costly for taxpayers but at this stage it is only available for unilateral APAs.
- The **standard APA product** deals with less complex international related party dealings that do not qualify for the simplified or complex APA product. A standard APA product may include collateral issues[6]. It is available for both unilateral and bilateral APAs.
- The **complex APA product** deals with complex international related party dealings. A Complex APA Product may include collateral issues where no ATO position exists for their resolution.

  The complex APA product is suitable for international related party dealings:

  (a) which are considered to be high risk

  (b) where there are no comparables

  (c) where there is a significant amount of tax involved, or

  (d) which may result, either directly or indirectly, in shifting of significant profit out of Australia.

  The complex APA product is available for both unilateral and bilateral APAs.

[4] In this practice statement references to bilateral APAs also include multilateral APAs.

[5] The Australian Competent Authority is a specifically delegated position of the Commissioner within the ATO. The Competent Authority may be described as those persons authorised to negotiate MAP cases on behalf of the ATO.

[6] A collateral issue is another administrative or tax issue in addition to transfer pricing relating to the international related party dealings. Collateral issues will be discussed in more detail in Chapter 3.

16. The attributes of the three APA products are as follows:

	APA Products			
	Simplified	Standard		Complex
Types of APA products	Unilateral	Unilateral	Bilateral	Unilateral / Bilateral
Target cycle time for a typical APA from pre-lodgment to finalisation (months) (a)	9	12	18 – 24	24
Threshold International Related Party Dealings	(b)	N/A	N/A	N/A
Existence of collateral issues and approach for their resolution exist	No	Yes	Yes	Yes, including where no ATO position exists
New APAs and renewals	Yes	Yes	Yes	Yes

Notes:

(a) It is expected that the pre-lodgment phase would take between one to three months depending on the type of APA product.

(b) See Chapter 3 – Eligibility for the simplified APA product.

Mutual expectations

17. The APA Program enables taxpayers to assure themselves that their international related party dealings comply with transfer pricing legislation on a voluntary basis. The cooperative nature of the APA process gives rise to the following mutual expectations between the taxpayer and the ATO:

(a) The taxpayer can expect the ATO to:

(i) co-operate fully with the taxpayer, including undertaking open and ongoing dialogue in the development of the APA

(ii) work with the taxpayer towards agreement on the scope of the APA and the treatment approach for any collateral issue(s) which will be parallel processed with the development of the APA where appropriate

(iii) make enquiries into the international arrangement, transfer pricing methodology[7] and arm's length price to ensure that it complies with Australia's transfer pricing rules

(iv) undertake examination into the collateral issues commensurate with the complexity and level of risk of these issues

(v) coordinate the resolution of the ATO position on any collateral issues

(vi) commit to the agreed scope of the APA, which will only be changed in exceptional circumstances

[7] A basis for establishing an arm's length transfer price or profit allocation under Division 13 of Part III of the *Income Tax Assessment Act 1936* and, when applicable, under various taxation treaties between Australian and its tax treaty partners.

(vii) provide timely guidance on the progress of the taxpayer's request for an APA

(viii) work with the taxpayer to agree on the information/documentation required in the development of the APA

(ix) jointly develop an APA case plan that contains a structured timeline and work plan

(x) ensure all APAs are subject to Transfer Pricing Review Panels (TPRP) [8] at key milestones in the process

(xi) work actively with the tax treaty partner in the development of a bilateral APA

(xii) have the right to withdraw from the APA process at any time before final agreement is reached

(xiii) provide the taxpayer with an internal review by the Head of the APA Program where:

- the ATO does not accept an APA Proposal
- the ATO and taxpayer cannot reach agreement on the scope of the APA
- the ATO withdraws from the APA
- a standstill has been reached in the APA process

(xiv) not limit its information gathering powers in relation to the development of the APA. It would be exceptional for these powers to be used as our inability to access information is likely to cause us to withdraw from the development process or cause the APA to be inapplicable

(xv) keep taxpayer information confidential in accordance with the secrecy provisions[9] and the Exchange of Information Article in any applicable taxation treaty

(xvi) apply the processes described in this practice statement consistently. However, the ATO may accelerate the APA process steps, for example, to align the ATO's processes with those of the tax treaty partner in a bilateral APA, or carry out process steps in parallel rather than sequentially to improve efficiency.

(b) The ATO expects the taxpayer to:

(i) co-operate fully with the ATO, including undertaking open and ongoing dialogue in the development of the APA

(ii) propose approaches that are consistent with Australia's transfer pricing rules

(iii) seek an APA only on international related party dealings that are commercially contemplated or are of a continuing nature from dealings that are already occurring

[8] The Transfer Pricing Review Panel is an internal ATO review body whose role is to oversee the standard of technical and case management decision making in transfer pricing casework.
[9] Division 355 of Schedule 1 to the *Taxation Administration Act 1953.*

(iv) make full and true disclosure of all relevant and material facts with respect to international related party dealings and any collateral issues

(v) work with the ATO towards agreement on the scope of the APA and the treatment approach for any collateral issue(s)

(vi) disclose any reasonably arguable position[10] the taxpayer applies or seeks to apply in connection with the international related party dealings and collateral issue(s)

(vii) provide the same information/documentation to all tax treaty partners which are proposed parties to the bilateral APA

(viii) provide information/documentation commensurate with the complexity of the arrangement and the level of risk

(ix) have the right to withdraw from the APA process at any time before final agreement on the APA is reached.

Benefits of Advance Pricing Arrangements

18. APAs are negotiated in a cooperative environment in which the ATO, the taxpayer and the tax treaty partner in a bilateral APA, use best endeavours to agree on a transfer pricing methodology that will result in what will be treated as an arm's length amount of consideration or profits to each related party in relation to their international related party dealings. An APA:

(a) provides a taxpayer with certainty on an appropriate transfer pricing methodology, enhancing the predictability of the tax treatment of the taxpayer's international related party dealings

(b) eliminates or substantially reduces the risk of double taxation arising from international related party dealings (particularly where the APA is bilateral)

(c) is prospective, but methodologies under an APA may be used subject to agreement, to resolve issues in years prior to the APA. For example, a taxpayer may seek an APA following a risk review but prior to an audit commencing, and the APA methodology may be agreed to be applied to years that would otherwise be subject to audit

(d) provides a possible solution to situations where there is no realistic alternative way of both avoiding double taxation and ensuring that all profits are correctly determined and taxed at the appropriate time

(e) provides taxpayers with a more flexible approach to obtaining approval for a novel methodology that is particularly appropriate to their circumstances

(f) reduces compliance cost to the taxpayer by eliminating the risk of transfer pricing risk review or audit and the imposition of penalties by taking a different practical approach to the application of the arm's length principle

(g) reduces the record keeping burden as taxpayers know in advance which records are required to be kept to substantiate the application of the APA approach to ascertaining pricing or profits relating to the covered international related party dealings

[10] A matter is reasonably arguable if it would be concluded in the circumstances, having regard to relevant authorities, that what is argued for is about as likely to be correct as incorrect, or is more likely to be correct than incorrect (refer to section 284-15 of Schedule 1 to the *Taxation Administration Act 1953*). There is also a discussion of when a taxpayer has a reasonable arguable position in a transfer pricing context at paragraphs 25 to 31 of Taxation Ruling TR 98/16 Income tax: international transfer pricing - penalty tax guidelines.

(h) allows a taxpayer to predict costs and expenses, including tax liabilities more accurately

Who can apply for an APA?

19. Any Australian taxpayer with international related party dealings may apply for an APA where those dealings are between:

    (a) related separate legal entities (including permanent establishments of separate legal entities)

    (b) a permanent establishment and its head office, or

    (c) two permanent establishments of the same entity.

20. Eligibility for the simplified APA product is detailed in Chapter 3.

How to apply for an APA

21. In the first place the taxpayer should contact the Transfer Pricing Gatekeeper[11] seeking a pre-lodgment meeting to discuss the requirements of the proposed APA. The APA proposal to be discussed at the pre-lodgment meeting should be submitted in writing to the:

    Transfer Pricing Gatekeeper
    Australian Taxation Office
    GPO Box 9977
    Melbourne VIC 3001

    Telephone: 03 9285 1365

    Alternatively the taxpayer may contact the Transfer Pricing Gatekeeper by e-mail: tpgatekeeper@ato.gov.au

    (File size cannot exceed 6MB. Files can be lodged in parts not exceeding 6MB)

    The ATO does not impose charges or fees for APAs.

CHAPTER 2 – OVERVIEW OF THE APA PROCESS

The five steps of the APA process

22. The five steps of the APA process for negotiating an APA are:

    Step 1: Pre-lodgment

    Step 2: Lodgment of formal application

    Step 3: Analysis and evaluation

    Step 4: Negotiation and agreement

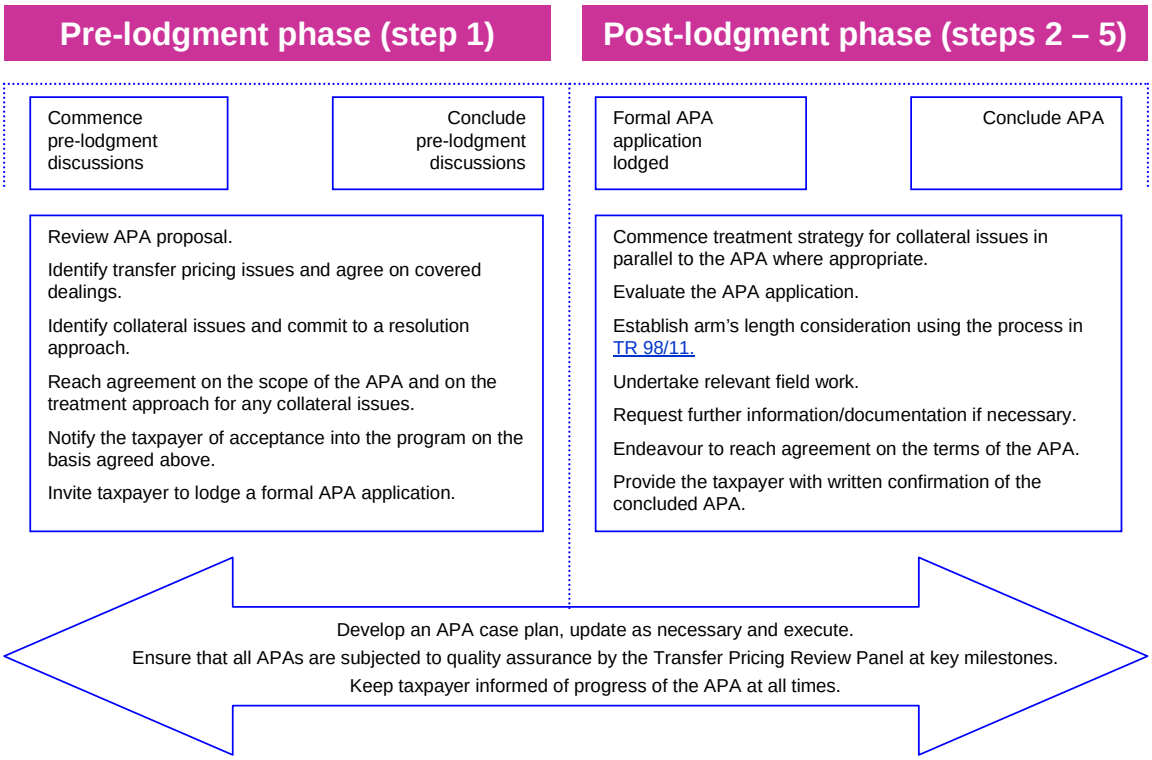
    Step 5: Conclude

23. The information/documentation requirements, processing and finalisation of each APA will depend on the individual facts and circumstances of each case. The processing of an APA will also depend on the case classification.

[11] The Transfer Pricing Gatekeeper is the central point in the ATO whereby all inbound transfer pricing work is directed (see paragraph 15 of PS LA 2006/9).

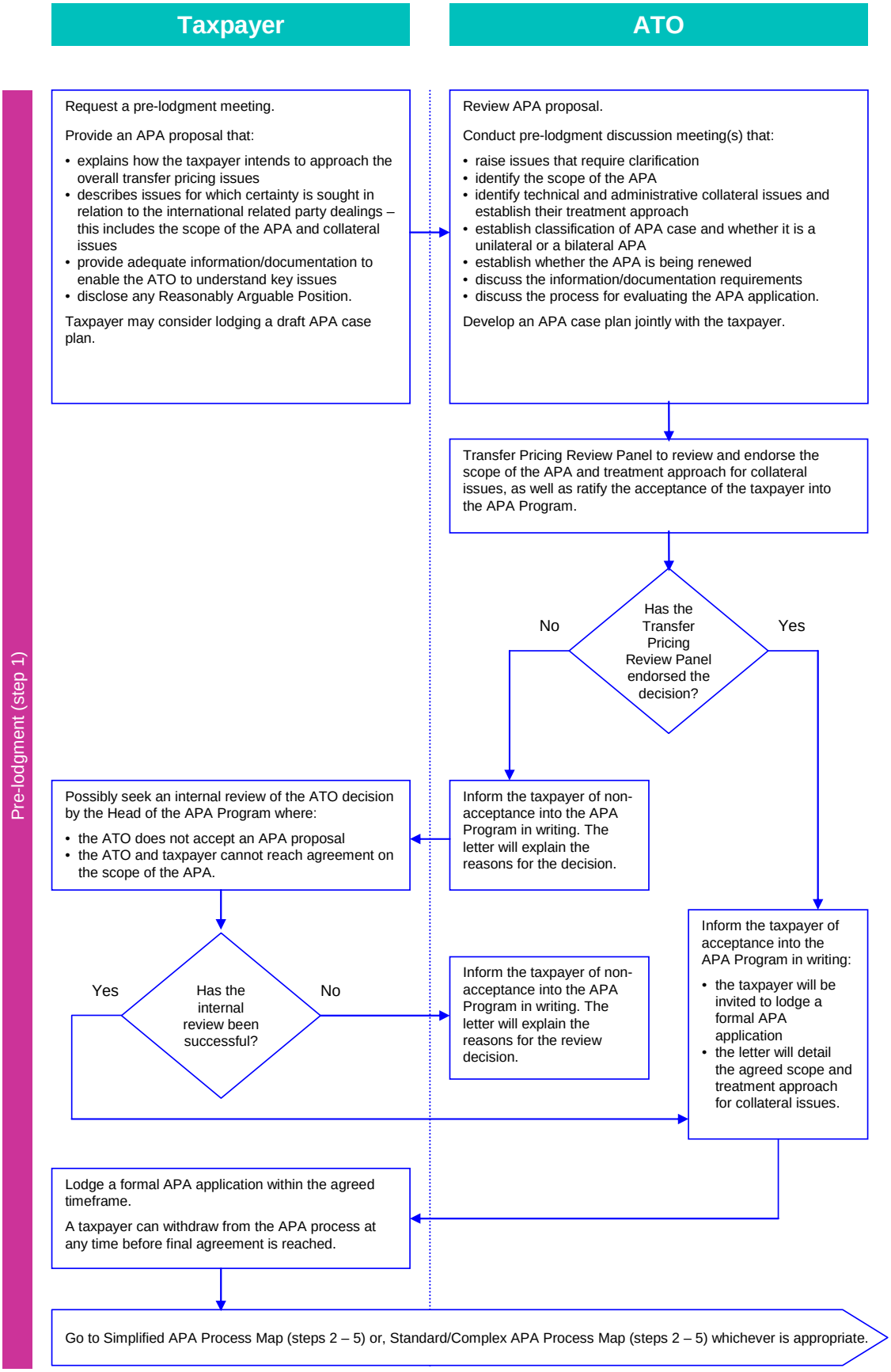
Overview of the APA process

24. The diagram below is an overview of the interactions between the pre-lodgment (Step 1 of the five steps of the APA process) and the post-lodgment phases (Steps 2 to 5 of the five steps of the APA process).



25. The following process maps are a more detailed explanation of the interactions between the ATO and taxpayer in the pre-lodgment and post-lodgment phases. These interactions are discussed further in the following chapters.

Pre-lodgment Process Map (Step 1)



Simplified APA Process Map (Steps 2 – 5)

	Taxpayer	ATO
Lodgment of formal application (Step 2)	Lodge a formal APA Application using the Simplified Unilateral APA Application Template with a signed declaration. The application should include: • a functional and industry analysis • information/documentation as agreed in the pre-lodgment meeting.	Keep taxpayer informed of progress of the APA at all times. Finalise the Simplified APA Case Plan, update as necessary and execute.
Analysis/Evaluation (Step 3)	Provide access to premises and staff so that relevant fieldwork can be undertaken by the ATO. Provide further information/documentation as requested.	Provide benchmarking for distributors and service providers, however, the taxpayer may choose to prepare its own benchmarking analysis. Provide reasonable assistance to eligible taxpayer other than a distributor or service provider in preparing an arm's length benchmarking analysis. Evaluate the data submitted and prepare benchmarking analysis where required. If required, establish arm's length consideration using the process in TR 98/11. Undertake relevant fieldwork (such as inspecting financial records). Request further information/documentation if necessary. Quality assure the APA through the Transfer Pricing Review Panel to confirm the ATO position.
Negotiation/Agreement (Step 4)	Endeavour to reach agreement on the terms of the APA with the ATO.	Discuss issues with the taxpayer in relation to benchmarking and endeavour to reach agreement on the terms of the APA included in the Simplified Unilateral APA Application Template.
Conclude (Step 5)	Sign the final APA and return it to the ATO. Lodge Annual Compliance Reports as and when required.	Finalise the APA based on the outcomes of the negotiations. Provide written confirmation of the arrangement entered into between the ATO and the taxpayer in the format of the Model Simplified Unilateral APA.

Standard/Complex APA Process Map (Steps 2 – 5)

	Taxpayer	ATO
Lodgment of formal application (step 2)	Lodge a formal APA application with declaration. The application should detail the scope of the APA and how collateral issues are to be addressed, and include: • a functional analysis and industry analysis • details of the proposed transfer pricing methodology • the terms and conditions governing the application of the transfer pricing methodology including critical assumptions • data showing that the transfer pricing methodology will produce an arm's length result • information/documentation as agreed in the pre-lodgment meeting. Work with the ATO to resolve the collateral issues. If the APA is bilateral the taxpayer should ensure its foreign affiliate meets the requirements of the APA process in the other jurisdiction.	Commence treatment strategy for collateral issues in parallel to the APA where appropriate. The APA case leader will coordinate any private binding ruling requests within the ATO on behalf of the taxpayer. Keep taxpayer informed of progress of the APA and collateral issues at all times. Finalise the standard/complex APA case plan, update as necessary and execute. If the APA is bilateral notify the tax treaty partner.
Analysis/Evaluation (step 3)	Provide access to premises and staff so that relevant fieldwork can be undertaken by the ATO. Provide further information/documentation as requested.	Evaluate the APA application. Establish arm's length consideration using the process in TR 98/11. Undertake relevant field work (such as interviews with staff from the operational side of the business). Request further information/documentation if necessary. Consider independent expert advice if requested. The APA will be reviewed at key milestones in the process by the Transfer Pricing Review Panel.
Negotiation/Agreement (step 4)	In a unilateral APA endeavour to reach agreement on the terms with the ATO. In a bilateral APA determine if the Competent Authority Mutual Agreement Procedure arrangement is acceptable. Where the taxpayer accepts the arrangement they will be required to notify the ATO of their acceptance in writing. If the Mutual Agreement Procedure arrangement is not acceptable or the Competent Authorities can not reach agreement then consider entering into a unilateral APA with the ATO, if offered.	Inform the taxpayer of the resolution of the collateral issue. The resolution of collateral issues will not form part of the content of the concluded APA. In most circumstances the collateral issue needs to be resolved prior to the agreement of the concluded APA. In consultation with the taxpayer, develop the draft APA terms. In a unilateral APA, the APA case leader will endeavour to reach agreement on the terms of APA with the taxpayer. In a bilateral APA, the Australian Competent Authority will formalise a Competent Authority Mutual Agreement Procedure arrangement with the tax treaty partner in consultation with the taxpayer (assuming agreement is reached). If the Mutual Agreement Procedure arrangement is not acceptable to the taxpayer or the Competent Authorities cannot reach agreement then consider offering the taxpayer a unilateral APA.
Conclude (step 5)	In a unilateral APA sign the final APA and return it to the ATO. In a bilateral APA confirm its agreement with the APA in writing to the ATO. Lodge Annual Compliance Reports as and when required.	In a unilateral APA the taxpayer and the ATO will finalise the APA agreement based on the outcomes of the negotiations and provide the taxpayer with written confirmation of the concluded APA. In a bilateral APA, where the taxpayer accepts the Competent Authority Mutual Agreement Procedure arrangement, the ATO will enter into a bilateral APA with the tax treaty partner. The ATO will confirm the terms of the bilateral APA with the taxpayer in a letter or similar document.

CHAPTER 3 – PRE-LODGMENT (STEP 1)

26. The pre-lodgment step of the APA process is common for all APA products. The purpose of the pre-lodgment step is to identify the scope of the APA (including the likely type of APA product) and identify any collateral issues and agree the resolution approaches upfront so that the formal APA application accurately reflects what has been agreed in the pre-lodgment step.

Pre-lodgment meeting

27. The ATO APA Team will arrange the pre-lodgment meeting. In a typical case there are a number of pre-lodgment meetings so that the formal application is based on a closer understanding of the circumstances and likely outcomes.

28. Pre-lodgment meetings should be used to clarify up front what both sides expect from the APA process. The discussions will generally follow the Pre-lodgment Meeting Agenda at Appendix 1 and can be used:

    (a) to identify transfer pricing issues and agree on the covered international related party dealings

    (b) to identify any collateral issue(s) and commit to a resolution approach for them

    (c) to agree on the scope of the APA

    (d) to discuss whether the APA will be bilateral or unilateral

    (e) to discuss the period and tax years to be covered by the APA

    (f) to ascertain whether the taxpayer's foreign affiliate has already approached the relevant tax treaty partner for a bilateral APA

    (g) to classify the APA (simplified, standard or complex and new or renewal)

    (h) to discuss the taxpayer's preliminary views on the transfer pricing method and in a simplified APA, the use of ATO benchmarking analysis

    (i) to jointly develop the initial APA case plan

    (j) to discuss whether there are any issues affecting prior years and if so, whether there should be a rollback of the APA result. This is particularly an issue where compliance activity (either risk review or audit) is being undertaken in Australia or in the other country involved

    (k) to discuss the information/documentation requirements and analysis

    (l) to determine whether independent expert advice is required

    (m) to assess the suitability of the APA request such as the cost and practicality of entering into an APA

    (n) to discuss with the taxpayer the process for acceptance into the program, including agreeing on a timeframe for lodging a formal APA application

29. APA pre-lodgment meetings do not bind either party to the APA Program that is, a pre-lodgment meeting does not mean the taxpayer has applied for an APA, or been accepted into the APA Program for development of an APA.

Eligibility for the simplified APA product

30. Any Australian taxpayer undertaking international related party dealings is eligible to apply for admission to the APA Program using the simplified APA process where the:

    (a) gross income of the taxpayer is less than $250 million, or

    (b) gross income of the taxpayer exceeds $250 million and the taxpayer satisfies the following conditions:

        (i) international related party dealings involving the purchase or sale of tangible goods do not exceed $150 million annually

        (ii) international related party dealings involving the provision or receipt of routine services do not exceed $50 million annually

        (iii) international related party dealings involving intangible property do not exceed $10 million annually.

31. The income and dealings limits apply for the Australian tax consolidated group which is the taxpayer for Australian purposes, and not individual companies within that group. However, it is intended that the simplified APA process be available to a maximum number of taxpayers, and the ATO may relax these eligibility criteria and allow access to the simplified APA process based on the activities of individual companies within a tax consolidated group.

32. While it is intended that the simplified APA process be available to as many taxpayers as possible, it may become apparent in pre-lodgment discussions that the complexity of dealings or other circumstances make the APA unsuitable for the simplified process. Both the taxpayer and the ATO will need to agree at the pre-lodgment stage that the APA is suitable for the simplified APA process in order for it to proceed under that process.

APA proposal

33. An APA proposal is required for the pre-lodgment meeting. Taxpayers should provide the APA proposal no later than five working days prior to the scheduled pre-lodgment meeting date so that:

    - the pre-lodgment meeting time is well used
    - the most appropriate ATO staff can attend
    - a meaningful discussion can occur.

34. Typically the APA proposal would take the form of a presentation and slide pack that is used at the pre-lodgment meeting. It must contain information addressing the relevant points raised in the Pre-lodgment Meeting Agenda (see Appendix 1).

35. The APA proposal will be reviewed and discussed at the pre-lodgment meeting(s). This is to ensure that both the ATO and taxpayer have a common understanding of the APA requirements and of the material in the APA proposal. The taxpayer may also consider providing a draft APA case plan with their APA proposal.

36. The onus is on the taxpayer seeking the pre-lodgment meeting to describe in its APA proposal the specific issues for which certainty is sought in relation to the international related party dealings and collateral issues, if any. It should have clear and adequate supporting documentation to outline the scope of the APA, including the methodology to be used and how any collateral issues can be resolved.

Scope of the APA

37. The scope of an APA will include such international related party dealings as are relevant for the purposes of Division 13 of Part III of the *Income Tax Assessment Act 1936* and the relevant provisions of Australia's taxation treaties.

38. The primary purpose of an APA is to determine an appropriate transfer pricing methodology which will be applied to arrive at an arm's length consideration or profit in respect of future international related party dealings or continuing arrangements with international related parties. An APA in most cases will be used to fix a particular price, range of prices, pricing formula, margin, or share of profit.

39. An APA may cover many different types of international related party dealings, including transfers of tangible or intangible property, services, cost sharing, global trading, and global manufacturing.

40. The ATO prefers that APAs cover all of the taxpayer's international related party dealings. Transfer pricing issues are often inter-related and the examination of methodologies requires a holistic review of the business. Taxpayers seeking an APA usually require holistic solutions. A specific issue or limited international related party dealings APA would therefore not usually be appropriate. The ATO may nevertheless be prepared to consider APA applications which are limited to specific groups of international related party dealings.

    For example, a taxpayer may only request an APA on significant royalty payments to its offshore associate. However, the taxpayer may also have considerable management and service fee payments to the offshore associate. The ATO will generally require the management and service fee payments to be considered in the APA as these payments could have an impact on the taxpayer's transfer pricing practices.

41. Once the scope of the APA is agreed between the taxpayer and the ATO, changes to it will only be made in exceptional circumstances. These may include:

    (a) changes to the taxpayer's international related party dealings

    (b) identification of a new issue involving significant tax risk

    (c) the need to interpret how the transfer pricing provisions apply to new international related party dealings, and/or

    (d) new issues that are raised by the tax treaty partner in a bilateral APA.

42. Any changes to the scope of the APA will be made in consultation with the taxpayer. If agreement on changes cannot be reached the development of the APA may not be able to proceed.

43. Lodgment of a formal application for an APA should occur only once agreement has been reached on the scope of the APA, as well as the identification and treatment approach for any collateral issues.

Collateral issues

44. A collateral issue is another administrative or tax issue in addition to transfer pricing relating to the international related party dealings. Collateral issues will be processed in parallel with the APA where possible.

45. The ATO will need to coordinate the resolution of the collateral issue with the finalisation of the APA. This may involve a technical interpretation or the development of administrative processes. Examples of collateral issues include but are not limited to:

(a) whether the covered international related party dealings involve a permanent establishment

(b) whether the income of an international related party is attributable income under the controlled foreign company's legislation

(c) whether there has been a capital gains tax event that affects the covered international related party dealings

(d) whether the arrangement constitutes or includes a scheme which might lead to a determination under Part IVA

(e) new issues on which the ATO view has not yet been determined

(f) an ATO risk review or audit currently in progress

(g) understanding a potential tax risk related to the APA international related party dealings that may require the ATO to initiate a risk review.

46. The taxpayer should provide an analysis of the application of the law to any identified technical collateral issue(s).

Part IVA as a collateral issue

47. Whether there is a scheme which might lead to a determination under Part IVA of the *Income Tax Assessment Act 1936* will need to be determined before progressing the APA. Where the taxpayer is prepared to request a private binding ruling in respect of the application of Part IVA, the APA case leader will work with the taxpayer to coordinate the ruling request. Where Part IVA applies in relation to the covered international related party dealings the ATO will withdraw from the APA process as no APA will be agreed where a determination under Part IVA could apply to arrangements included in those covered by the APA.

Preliminary APA case plan

48. A preliminary APA case plan will need to be drafted before the final application is lodged.

49. The APA case plan will be developed jointly between the taxpayer and the APA Case Leader. The relevant documents are:

- Instructions for completing an APA Case Plan
- APA Case Plan for Simplified APAs
- APA Case Plan for Standard or Complex APAs

50. The agreed scope of the APA and treatment approach for collateral issues will form part of the APA case plan. The APA case plan will contain a structured timeline and work plan which will be jointly developed with the taxpayer and, where possible, the tax treaty partner for a bilateral APA. Both the ATO and taxpayer should use their best endeavours to adhere to the timeline and work plan. The progress of the APA application will be reviewed against the plan regularly throughout the process and when required, the APA case plan should be updated.

51. The APA case plan agreed between the ATO and the taxpayer will also set out the information/documentation required by the ATO, the date it is required, an explanation of the relevance of the information/documentation request, and the agreed processes for gathering information.

52. If it becomes necessary to alter the scope of the APA or the treatment approach for collateral issues, the ATO would seek agreement of the potential changes with the taxpayer and the APA case plan would be amended to reflect those changes.

Acceptance into the APA Program

53. A Transfer Pricing Review Panel should review and endorse a decision to accept or not accept a taxpayer into the APA Program.

54. The ATO will write to the taxpayer to advise whether the case has been 'accepted' or 'not accepted' into the APA Program.

55. Where a taxpayer is 'accepted' into the APA Program they will be invited to make a formal APA application. The letter of acceptance should state that the ATO accepts the APA proposal, and confirms that it reflects the agreement reached at the pre-lodgment meeting(s).

56. Where an APA request is 'not accepted' into the APA Program the ATO will provide reasons for that decision. The taxpayer can seek an internal review of the ATO decision by the Head of the APA Program.

CHAPTER 4 – SIMPLIFIED APA PROCESS (STEPS 2 – 5)

Lodgment of formal application

57. A formal application for an APA under the simplified APA process must be lodged using the Simplified Unilateral APA Application Template with a signed declaration (see Chapter 5). The taxpayer is required to lodge one copy of the formal application with the Transfer Pricing Gatekeeper.

58. Under the simplified APA process an eligible taxpayer is required to provide the information/documentation as agreed in the pre-lodgment meeting(s), a functional analysis and industry analysis with their APA application.

Final simplified APA case plan

59. A simplified APA case plan will need to be finalised jointly between the taxpayer and the APA case leader after the formal application is lodged.

Analysis and evaluation

60. For taxpayers who are classified as distributors or service providers the ATO will provide an arm's length benchmarking analysis that they may use with their APA application, however the taxpayer may choose to prepare its own benchmarking analysis. The ATO will provide reasonable assistance to an eligible taxpayer other than a distributor or service provider in preparing an arm's length benchmarking analysis for its APA application.

61. Where the taxpayer chooses to do its own benchmarking the information/documentation requirements are similar to the requirements for a standard APA (see Chapter 6). In these APAs the ATO will establish the arm's length consideration using the process in Taxation Ruling TR 98/11 Income tax: documentation and practical issues associated with setting and reviewing transfer pricing in international dealings. This may extend the cycle time for processing the APA.

62. In reviewing and verifying the data supplied by the taxpayer, the APA Team may require further information/documentation including undertaking relevant fieldwork, such as inspecting financial records.

Negotiation and agreement

63. The ATO will endeavour to reach agreement with the taxpayer on the terms of the APA as set out in the Simplified Unilateral APA Application Template.

Conclude

64. The taxpayer and the ATO will finalise the APA based on the outcomes of the negotiations.

65. The ATO will provide written confirmation of the arrangement entered into between the ATO and the taxpayer in the format of the Model Simplified Unilateral APA. The taxpayer is required to sign the final APA and return it to the ATO.

CHAPTER 5 – STANDARD/COMPLEX APA PROCESS – LODGMENT OF FORMAL APPLICATION (STEP 2)

66. A taxpayer wishing to proceed should lodge a formal APA application setting out the scope of the APA and how collateral issues are to be addressed on the basis of the agreement reached at pre-lodgment.

APA application

67. The taxpayer should lodge one copy of the formal APA application with the Transfer Pricing Gatekeeper.

68. The Public Officer of the taxpayer should state in the formal APA application:

> I declare that I have examined the attached APA application, including accompanying documents, and to the best of my knowledge and belief, the facts presented in support of the application are true, comprehensive and accurate.

69. If the application is lodged electronically a scanned signed soft copy or signed hard copy of the declaration needs to be included.

Contents of the APA application

70. The taxpayer is encouraged to meet with the APA case leader during the preparation of its application. The ATO welcomes the opportunity to review drafts, tables and data included in the preparation of the application.

71. The ATO does not prescribe any set format or method of presentation for an APA application. However, in preparing its case, each taxpayer is required to indicate clearly the transfer pricing methodology proposed and the reasons in support of that method. All documentation should be clearly labelled, indexed and referenced.

72. The APA application should detail the scope of the APA and how collateral issues are to be addressed, and include:

    (a) a functional analysis and industry analysis

    (b) details of the proposed transfer pricing methodology

    (c) the terms and conditions governing the application of the transfer pricing methodology including critical assumptions

    (d) data showing that the transfer pricing methodology will produce an arm's length result

    (e) information/documentation as agreed in the pre-lodgment meeting.

73. The formal APA application should be lodged with the Transfer Pricing Gatekeeper within the timeframe agreed to at the pre-lodgment meeting(s) and/or as set out in the preliminary APA case plan.

74. The ATO will acknowledge receipt of the formal APA application in writing. The letter will state whether the APA application reflects the ATO's understanding of the agreement reached at the pre-lodgment meeting(s). The taxpayer will be advised where the application does not reflect the ATO's understanding of the agreement reached at the pre-lodgment meeting(s) and informed of the required amendments to the application for the ATO to progress the APA.

75. Following lodgment of the formal APA application by the taxpayer, all subsequent correspondence and negotiations should be through the APA case leader handling the APA request.

76. In a bilateral APA the taxpayer should ensure that its foreign affiliate meets the requirements of the APA process in the other jurisdiction. This will afford the tax treaty partner the opportunity to undertake its own evaluation and analysis of the case from its perspective in preparation for negotiations with the Australian Competent Authority. It should be noted that the tax treaty partner may contribute information or insights not known to the ATO, or take different positions in relation to appropriate transfer pricing methodology.

77. As soon as is administratively practicable, but no later than 30 days after receipt and acceptance by the ATO of a formal bilateral APA application, the Australian Competent Authority will notify the relevant tax treaty partner and enquire whether they wish to participate in the bilateral APA process.

Treatment of collateral issues

78. Where a collateral issue is identified, the taxpayer and the ATO will need to agree during the pre-lodgment discussions how the ATO should resolve the collateral issue. The taxpayer will have to work with the ATO to resolve the collateral issues. The options may include:

    (a) private binding ruling

    (b) referral to a Centre of Expertise for advice

    (c) ATO risk assessment where the provision of further information may be required to enable an ATO risk assessment to be made.

79. Where a private binding ruling is requested by the taxpayer the APA case leader will coordinate the request with the APA process.

80. Where a collateral issue arises for which there is no established ATO position, we will, whilst ensuring confidentiality of the taxpayer's dealings, provide external stakeholders with the opportunity to have input into the development of an ATO position. This is because an ATO position on a collateral issue is ordinarily a general position with wider application by the ATO.

81. There may be circumstances where the issue to be considered has implications beyond the specific APA to a particular class of dealings/arrangements or taxpayers. This may mean that the APA will be progressed in parallel with the development of the ATO public position.

Final standard/complex APA case plan

82. A standard/complex APA case plan will need to be finalised jointly between the taxpayer and the APA case leader as soon as practical after the formal application is lodged.

CHAPTER 6 – STANDARD/COMPLEX APA PROCESS – ANALYSIS AND EVALUATION (STEP 3)

83. This chapter outlines the information/documentation requirements for a standard/complex APA. Information/documentation requirements for collateral issues will be discussed at the pre-lodgment meeting(s). The taxpayer is expected to disclose any reasonably arguable position that they seek to apply in connection with the international related party dealings and collateral issues.

84. Upon receipt of the formal APA application, the APA team will evaluate the data submitted and any other relevant information/documentation. The APA team will contact the taxpayer and discuss and clarify the information submitted. If necessary, the ATO will request any further information/documentation considered relevant to the application of the proposed transfer pricing methodology.

85. The ATO's key role requires a critical analysis of the APA application rather than undertaking original work to establish the arm's length outcome, but the ATO may choose to undertake original work in some circumstances.

86. The ATO's preferred process for determining an arm's length price is discussed in TR 98/11.[12]

87. In reviewing and verifying the data supplied by the taxpayer, the APA team may undertake relevant fieldwork (for example, inspections of taxpayer's premises, interviews with staff including staff from the operational side of the business, review of financial or managerial operations, et cetera).

Overview of information/documentation requirements

88. The ATO and the taxpayer will agree on the information/documentation required for an APA and this will be set out in the APA case plan.

89. The extent of information/documentation necessary to determine an appropriate transfer pricing methodology and arm's length outcome will depend on the facts and circumstances of each individual case and a degree of flexibility is needed by both parties.

[12] The ATO booklet titled, 'Applying the Arm's Length Principle' also discusses the process for testing international transfer pricing.

90. The guiding principle for the taxpayer should be:

(a) to provide the information and documentation to the ATO necessary to explain the facts relevant to the appropriateness and application of the proposed transfer pricing methodology

(b) to demonstrate its application will produce transfer pricing in accordance with Australia's transfer pricing rules.

The guiding principles the ATO will follow when gathering information informally are discussed at page 29 of the Large business and tax compliance 2010 booklet.

91. In the case of a bilateral APA, the taxpayer should also advise the ATO of the information/documentation requests made by the tax treaty partner in relation to the APA application and ensure that the ATO is provided with copies of any information/documentation supplied by them or their affiliates to the tax treaty partner.

92. Relevant documentation kept outside Australia by a taxpayer should be provided to the ATO within the agreed timeframe[13].

93. All documents submitted in a foreign language must be accompanied by an English translation. An English translation must be provided for documents not submitted but described in the APA application, upon request by the ATO.

Information/documentation requirements – standard APAs

94. The list provided in this practice statement is not intended to be exhaustive nor prescriptive. It is indicative of the information/documentation requirements for a standard or complex APA. Some of the documentation and information may have already been provided with the APA proposal.

95. The information/documentation typically required by the ATO for a standard APA application includes:

(a) Related parties involved in the APA

(i) A statement of the names and addresses of all taxpayers or parties to the APA

(ii) Details of the company group of which the taxpayer is a member, including details of the ownership structure (that is, an organisational chart)

(iii) Details of the principal businesses and the places where such businesses are conducted

(iv) Whether the taxpayer proposes a bilateral or unilateral APA and the reasons for their choice

(v) In the case of the bilateral APA, the countries of residence of the applicant, the related party or parties to be covered by the APA and the countries in and between which they conduct business.

(b) Term of the APA

(i) Proposed years to be covered by the APA

(ii) Where appropriate, the proposed retrospective application of the APA methodology and details of any issues affecting prior years, together with proposals for the resolution of those issues.

[13] For the general principle see paragraph 9.5 of TR 98/11.

(c) Covered international related party dealings

(i) A description of the size, nature/characterisation and value of the covered international related party dealings

(ii) General information on any other international related party dealings not intended to be covered by the APA

(iii) A description of the key international agreements between the related parties

(iv) Details of any significant transfer pricing arrangements or practices.

(d) Functional analysis

(i) A description of the taxpayer's business

(ii) Details of the economically significant functions performed by each party to the covered international related party dealings, assets used in the process and risks assumed, with a focus on the key value drivers relevant to the dealings.

(e) Industry analysis

(i) A description of the industry and the market in which the taxpayer operates

(ii) An explanation of the taxpayer's position in the industry, including a list of major competitors.

(f) Selection and application of the transfer pricing methodology

(i) A description of the proposed transfer pricing methodology and the reasons why that method is the most appropriate methodology[14]

(ii) Whether or not a recognised transfer pricing method is used presently to test or set the transfer prices of covered international related party dealings. If not, what method is used to set their prices?

(iii) Where applicable, a description of the most appropriate profit level indicator and reason(s) for its selection

(iv) Sufficient data to apply the transfer pricing methodology and to demonstrate that the outcome produced is arm's length

(v) The proposed source(s) of comparable data and the key characteristics or criteria to be met by any uncontrolled transaction in order to be regarded as potentially comparable

(vi) A description of the proposed comparables and an analysis of the key comparability factors between the comparables and the tested party[15]

[14] TR 98/11 contains a discussion of the documentation relevant to the selection and application of particular transfer pricing methodologies:

- Comparable Uncontrolled Price [see paragraph 7.4 of TR 98/11]
- Resale Price Method [see paragraphs 7.5 and 7.6 of TR 98/11]
- Cost Plus Method [see paragraphs 7.7 to 7.11 of TR 98/11]
- Profit Split Method [see paragraphs 7.12 and 7.13 of TR 98/11]; and
- Transactional Net Margin Method [see paragraphs 7.14 to 7.16 of TR 98/11].

[15] A tested party is the taxpayer whose outcomes are measured against the parameters agreed in an APA.

(vii) Details and calculation of any proposed adjustments to the comparables' results

(viii) The proposed arm's length result or range which results from the application of the transfer pricing methodology

(ix) Likely or forecast outcomes from the proposed methodology (including sensitivity analysis) during the term of the APA

(x) The process by which any necessary adjustments to the taxpayers' actual results may be made during the course of the APA (compensating adjustments).

(g) Other

(i) The tax and financial position of all parties involved in the APA for the last 3 years, including sales, cost of goods sold, operating expenses, profit before taxes, assets, liabilities, number of employees and any other relevant data

(ii) Information on forecast/budgeted financial position during the APA period

(iii) A description of any events critical to the taxpayer's business operations and their ability to achieve specified results under the proposed APA (that is, critical assumptions).

Information/documentation requirements – complex APAs

96. The information/documentation typically required by the ATO for a complex APA application includes information in addition to that required for a standard APA. This is especially desirable so that the taxpayer understands the purpose and reasons for any ATO enquiry and can clearly understand why the information is being requested.

97. Depending on the transfer pricing issues or risks proposed to be covered by the scope of the APA and collateral issues involved, additional information may be required. The ATO will explain the relevance of additional information requested and how it relates to the APA application.

98. Some topics may require detailed examination. For example, information that is likely to be required for cases where there are no comparables includes:

(a) pricing strategies within the multinational enterprise group and how these were determined; and

(b) information on the relative bargaining power of the parties to the transaction(s) had they been dealing with each other at arm's length, including consideration of other options realistically available to the taxpayer and its related parties had they not entered into the international related party dealings.

Form of provision of information

99. Where the records or documents to be produced are voluminous, the taxpayer may agree with the ATO that they need not be submitted with the APA application. However, the documents must be described, referenced and have their location stated in the application. The taxpayer must undertake that the documents will be made available upon request by the ATO.

Independent experts

100. Independent experts are generally not required in an APA.

101. In cases that involve complex transfer pricing issues the taxpayer may be requested by the ATO to provide, at the taxpayer's expense, an independent expert mutually acceptable to the taxpayer and the ATO (and, where relevant, the tax treaty partner) to review and evaluate the taxpayer's proposed transfer pricing methodology.

102. Whether an independent expert is likely to be required will be discussed at the pre-lodgment meeting(s) or at a subsequent meeting with the taxpayer following lodgment of the formal APA application. While the ATO may not be in a position to determine whether an expert is required until reviewing the formal application, the taxpayer may provide commentary in the formal application as to whether, in their opinion, an independent expert is required.

103. The function of an independent expert would be to provide an opinion that represents a critical analysis of the taxpayer's proposal. The independent expert would comment on the adequacy of the taxpayer's economic study, address the questions and concerns of the taxpayer and the ATO (and, where relevant, the tax treaty partner) and conclude whether the proposed transfer pricing methodology is supportable under the arm's length principle and fairly represents the interests of all parties to the APA. The independent expert may put forward a revised version of the APA which meets all requirements and supports and produces an arm's length approach, or may identify further information required before such a revised version could be put forward.

104. The independent expert's opinion would be considered by the ATO in examining the transfer pricing methodology but would not bind the ATO, the taxpayer or the tax treaty partner, in accepting or rejecting the proposed transfer pricing methodology.

105. The ATO may (at any stage of the APA process) engage its own expert, at its own expense, to review the taxpayer's proposal or that of the independent expert. In such cases, the ATO will advise the taxpayer that it has done so. This expert will have access to all information provided under the APA process having regard to confidentiality and conflict of interest considerations and will be subject to the secrecy provisions.[16]

106. Where the ATO is relying upon its own independent expert, where possible, the ATO will share the advice of that expert with the taxpayer. The release of this advice will be dependent on the finalisation of the ATO position in respect of the advice sought and any confidential third party information contained in the report.

CHAPTER 7 – STANDARD/COMPLEX APA PROCESS – NEGOTIATION AND AGREEMENT (STEP 4)

107. In a unilateral APA the ATO will endeavour to reach agreement on the terms of the APA with the taxpayer. In a bilateral APA the ATO will endeavour to reach agreement on the terms of the APA with the tax treaty partner in consultation with the taxpayer.

[16] Division 355 of Schedule 1 to the *Taxation Administration Act 1953.*

Resolution of collateral issues

108. The ATO will inform the taxpayer of the resolution of the collateral issue. The resolution of collateral issues will not form part of the content of the concluded APA. In most circumstances the collateral issue needs to be resolved prior to the agreement of the concluded APA.

Draft APA terms

109. The ATO will prepare the draft APA terms in consultation with the taxpayer. The purpose of the draft APA terms is to ensure that the taxpayer and the ATO have a common understanding of the issues to be agreed in the APA and, where a bilateral APA is contemplated, to form the basis for negotiation with the tax treaty partner.

ATO negotiations with the tax treaty partner

110. The Competent Authority is responsible for liaison and negotiation with the tax treaty partner.

111. There may be times when the APA team and its counterpart in the foreign country may need to liaise in order to discuss or clarify specific issues in respect of the APA. This should be done through the Competent Authority.

112. Regular meetings between the tax treaty partners are not only required for cases where there are significant issues on which the ATO will endeavour to reach agreement but also for less complex cases to negotiate key aspects of the cases to ensure that the APA is concluded within the ATO's target time frame.

113. Where a bilateral case stalls, the Competent Authority of Australia and the tax treaty partner may agree to subject the case to a review by senior officials of the ATO and tax treaty partner who would determine the reason(s) for the delay and agree on approaches to ensure the efficient completion of the case.

Taxpayer representations in a bilateral APA

114. The taxpayer does not have a right to be present at Competent Authority negotiations. However, in some cases, a factual presentation by the taxpayer to both Competent Authorities may be helpful. Where approval for presentation to both Competent Authorities at the same time has not been obtained from the foreign Competent Authority, the taxpayer may be given an opportunity to present their case to the Australian Competent Authority alone.

Competent Authority MAP arrangement

115. Following review, discussion and negotiation, the ATO, in consultation with the taxpayer, will formalise a Competent Authority MAP arrangement with the tax treaty partner which specifies the acceptable transfer pricing methodology, how it is to be applied, and critical assumptions (assuming that agreement is reached).

116. The Competent Authority MAP arrangement may be in any form agreed to by the Competent Authorities. For example, it may be in the form of an exchange of letters stipulating the agreed terms of the APA. Alternatively, the arrangement may be a more formal document.

117. The taxpayer can either accept or reject the Competent Authority MAP arrangement. Where the taxpayer accepts the arrangement they will be required to notify the ATO of their acceptance in writing.

118. If the Competent Authority MAP arrangement is not acceptable to the taxpayer then the ATO may consider offering a unilateral APA between the taxpayer and the ATO. The taxpayer can then choose whether or not they want to enter into a unilateral APA.

Where agreement cannot be reached with the tax treaty partner in a bilateral APA

119. Where a taxpayer has applied for a bilateral APA, but:

    (a) the tax treaty partner does not wish to participate in the APA process, or

    (b) the ATO is unable to reach agreement with the tax treaty partner within a reasonable timeframe

    the matter may be concluded as though it were a request for a unilateral APA with the approval of both the taxpayer and the ATO.

Exchange of information

120. The exchange of information between Competent Authorities will be undertaken pursuant to the Exchange of Information Article of the relevant taxation treaty.

121. In processing a bilateral APA, communication between tax treaty partners will usually be through the exchange of position papers and issues papers, as well as telephone conferences or face-to-face meetings, where required. The position papers outline the terms of the APA which each tax treaty partner is prepared to accept and also highlight any concerns which may exist with the proposed APA.

122. The ATO will explain its position to the taxpayer but will not provide a copy of the tax treaty partner's position paper as this is part of the government-to-government process under the taxation treaty.

CHAPTER 8 – STANDARD/COMPLEX APA PROCESS – CONCLUDE (STEP 5)

123. The taxpayer, the ATO and, where relevant, the tax treaty partner will finalise the APA terms based on the outcomes of the negotiations.

124. In a unilateral APA the taxpayer and the ATO will finalise the APA agreement based on the outcomes of the negotiations and the ATO will provide the taxpayer with written confirmation of the concluded APA. The taxpayer is required to sign the final APA and return it to the ATO.

125. In a bilateral APA where the taxpayer accepts the Competent Authority MAP arrangement, the ATO will enter into a bilateral APA with the tax treaty partner. The ATO will confirm the terms of the bilateral APA with the taxpayer in a letter or similar document. The taxpayer is required to confirm its agreement with the APA in writing.

126. The ATO's covering letter to the APA will contain the assurance provided by an APA (see Chapter 1).

Form and content of concluded APAs

127. A concluded APA may generally be expected to contain at least the following information:

    (a) the names and addresses of the parties to the APA

    (b) the international related party dealings covered by the APA

    (c) the period and tax years covered by the APA

    (d) the agreed transfer pricing methodology and how it is to be applied to the covered international related party dealings, for example, the calculation of gross profit or net operating profit margins

    (e) if applicable, the arm's length range agreed under the APA

    (f) a definition of relevant terms which have formed the basis of calculating the transfer pricing methodology (for example, sales, cost of sales, operating profit, et cetera,)

    (g) the accounting standards on which the financial statements are based

    (h) critical assumptions upon which the transfer pricing methodology is based

    (i) procedures to be followed if it is necessary to make compensating adjustments

    (j) the taxpayer's consequential obligations as a result of the agreement to the APA (for example, the need to lodge annual reports and the taxpayer's record keeping requirements).

Term of an APA

128. An APA will have prospective application only and will have a specific duration – usually three to five years. The commencement date for an APA will be discussed at the pre-lodgment meeting and will be specified in the APA.

Taxpayer initiated APAs

129. Pre-lodgment discussions for a unilateral APA should commence at least six months prior to the anticipated commencement date for the APA, that is, for an APA commencing from 1 January 2012, a taxpayer should commence pre-lodgment discussions no later than 30 June 2011. Bilateral APAs require the same consideration but also need to take into account any specific requirements of the tax treaty partner.

Compliance induced APAs

130. The commencement date for an APA undertaken to resolve transfer pricing issues arising from ATO active compliance is likely to be affected by considerations of rollback or transfer pricing methodology or prior year examination and as a result may commence from the beginning of the financial year in which APA negotiations are finalised. Again, bilateral APAs need to take into account any specific requirements of the tax treaty partner.

Delayed finalisation

131. In the event that finalisation of an APA application is delayed substantially beyond the taxpayer's requested commencement date, the ATO will normally seek to specify a later commencement date for the APA in order to preserve the prospective nature of the agreement. The ATO will also seek to preserve the prospective three to five year duration of an APA.

132. Where a later commencement date is specified for the APA, the ATO will typically seek to rollback the methodology agreed in the APA into the prior year(s) intended to be covered in the original application and/or extend the period of the APA.

Compensating adjustments

133. The APA process envisages the use of compensating adjustments where the actual result of the tested party falls outside the agreed price, result or range, but is within the critical assumption boundaries. The APA will specify the price, result or point in the range to which a compensating adjustment should be made. Australia's domestic tax laws will determine the treatment to be afforded to compensating payments for the purpose of calculating taxable income for Australian tax purposes.

    For example, assume that the Australian taxpayer incurs a further liability under the agreed APA after the close of the taxable year because their actual results exceeded the top of an agreed range or result. Generally, that further liability will only be allowed as a deduction in the year in which it is incurred despite the fact that the adjustment may relate to international related party dealings undertaken in the previous year. However, a deduction would be allowable for the previous year if the liability under the agreed APA had been incurred prior to the close of that taxable year and the subsequent adjustment was merely a calculation exercise.

Critical assumptions

134. An APA will define in advance those critical factors and assumptions that are so significant that neither party in an arm's length situation would continue to be bound by the APA if any of them changed.

135. A critical assumption can be any fact about the taxpayer, an affiliate, a third party, an industry or general economic conditions that, if it changed, would significantly affect the appropriateness of the substantive terms of the APA or the basis upon which it was agreed.

136. Decisions about the suitability of a particular transfer pricing methodology and its application will be made on the basis of the facts existing (including projected facts) at the time. If particular circumstances are seen as central to the decision such that any changes in them would materially affect the suitability of the transfer pricing methodology or the way in which it is to be applied under the APA, these circumstances will need to be addressed by the taxpayer and be included in the APA application as 'critical assumptions'. Critical assumptions should be noted even where they are not within the taxpayer's or the ATO's control.

137. If there is a breach of a critical assumption the taxpayer, ATO and, where applicable, the tax treaty partner should enter into discussions to revise, modify, suspend or cancel the APA if agreement on a revised transfer pricing methodology cannot be reached.

138. The taxpayer's notification to the ATO that a breach in critical assumptions has taken place, together with supporting documentation and a proposed course of action (for example, revision of the APA) should be lodged as early as possible.

139. However, in looking at such circumstances as compelling business reasons, including general or economic downturn, the ATO would assess whether arm's length parties could reasonably have been expected to foresee or anticipate the event at the time the APA was entered into and, if so, whether the agreed transfer pricing methodology has sufficiently taken this into account. In any event, the arm's length test would be used to determine whether the change in critical assumptions is such that arm's length parties would have renegotiated such an arrangement due to the change in circumstances.

140. In some cases a breach in a critical assumption may not require any change in the APA. In those situations the APA may be suspended and reactivated if circumstances change, subject to the consent of all parties (including the tax treaty partner in a bilateral APA).

141. If the APA is revised or modified, the effective date of the revised or modified APA will be stated in the new APA. The revised or modified APA should also note the date on which the original APA is no longer effective.

142. If a revised or modified APA cannot be negotiated, the APA will be suspended or cancelled. Unless otherwise agreed, the APA will be suspended or cancelled as from the beginning of the income year in which the event giving rise to the change in circumstances occurred. In general, an APA is intended to be applicable for the whole of the income year or to be inapplicable for that income year.

Annual Compliance Report

143. The taxpayer will be required, as part of the APA, to prepare an Annual Compliance Report (ACR), for each year of the APA, containing sufficient information to detail the actual results for the year and to demonstrate compliance with the terms of the APA. The ACR is separate from any requirement the taxpayer has to self assess and lodge an annual income tax return.

144. The ATO has developed an Annual Compliance Report summary document to be completed by the taxpayer for each year of the APA that needs to be supported by a financial analysis of compliance with the APA and detail any compensating adjustments made. The completed ACR requires the Public Officer to state:

> I declare that I have examined the information contained in this APA Annual Compliance Report, including accompanying documents, and to the best of my knowledge and belief, the facts presented within this report and accompanying documents are true, comprehensive and accurate.

145. The ACR is to be forwarded by the taxpayer to the Transfer Pricing Gatekeeper at the time of lodging their income tax return for the same year as the APA year. Alternatively, the ATO may specify an alternative time for lodgment of the ACR. In a bilateral APA a similar ACR may also be required by the tax treaty partner involved.

146. The ACR should include, for example:

(a) information and computations necessary to ascertain the outcome of the application of the transfer pricing methodology for the covered international related party dealings and demonstrate the extent of compliance with the transfer pricing methodology and other terms of the APA

(b) an analysis of any compensating adjustment required under the APA, and a detailed description of the manner in which the adjustment was effected.

147. The ATO will review the ACR and, if necessary, may request further information to verify that the taxpayer has complied with the terms of the APA. If the taxpayer fails to provide an ACR or supply the additional information requested within a reasonable time, the ATO may cancel the APA. These possible consequences would be reflected in the APA itself as a condition of its continuance.

148. Where the ATO is satisfied that the taxpayer has complied with the terms of the APA, the ATO will make no further contact with the taxpayer other than an acknowledgment letter. The taxpayer will only be contacted where it is necessary to clarify the contents of the ACR or to request further information. In the case of a bilateral APA, the tax treaty partner may also review the ACR. If they raise any issue the Australian Competent Authority may need to seek additional information from the taxpayer.

149. Where a taxpayer fails to comply with annual reporting requirements, the ATO would not be bound by any undertaking not to conduct an audit of any transfer pricing issue covered by the APA. The ATO would consider cancelling the APA where the records did not enable the ATO to confirm readily that the transfer pricing methodology was applied as required by the terms of the APA and that critical assumptions were met or adhered to.

150. If it is discovered that the ACR was false or misleading, the previous issue of an acknowledgment letter would not prevent follow up action by the ATO.

Record keeping requirements

151. The taxpayer must retain all records relied upon in concluding the APA and all supporting data referred to in any ACR or used in applying the APA. The APA may specify the record retention period or specifically provide that certain records need not be retained.

152. Unless otherwise stated in the APA, the taxpayer is required to keep all records in accordance with the record keeping requirements under the *Income Tax Assessment Act 1936*, for example, section 262A. Upon request, any records needed by the ATO for the purpose of monitoring the APA are to be made available to the ATO within a reasonable time. The ATO will consider cancelling the APA for the remaining term if it is found that any of the critical assumptions and conditions has not been adhered to or where the records do not enable the ATO to readily confirm that such assumptions and conditions have been met.

CHAPTER 9 – APA RENEWALS

How to renew an APA

153. A unilateral or bilateral APA may be renewed with the consent of all the parties to it, including the tax treaty partner who is a party to a bilateral APA. A request for renewal of the APA should follow the same procedures that apply to the initial APA request. The renewal may be eligible for the streamlined APA renewal process or the APA extension process provided all parties agree.

154. It is essential for taxpayers to seek renewal early enough to allow the renewal to be negotiated and put in place prior to the expiration of the earlier APA period so that the renewal can be concluded prospectively. Ideally, the taxpayer should consider seeking a renewal at least six months before the expiration of the existing APA.

155. When requesting renewal of an APA, the taxpayer must establish to the satisfaction of the ATO that the terms of the APA were substantially complied with and that all material facts were disclosed and properly stated.

156. Where the material facts, critical assumptions or computations appear to remain valid, the ATO may still require new or updated economic studies, analyses and supporting documentation, before agreeing to any streamlined renewal or extension of the APA.

157. Where the renewal involves changes to the terms of the existing APA then the renewal process will be similar to the original APA process.

Streamlined APA renewal process

158. A streamlined APA renewal process is available for both unilateral and bilateral APAs, subject to the agreement of the tax treaty partner for bilateral APAs.

159. A streamlined APA renewal process is available where it is clear that there have been no material changes to the covered international related party dealings or to the terms of the APA, after updating the relevant benchmarking, and it is unlikely that there will be material changes over the period of the renewed APA.

160. Eligibility for the streamlined APA renewal process will need to be agreed at the pre-lodgment meeting for the renewal of the APA and is subject to the following conditions:

    (a) compliance with the terms of the previous APA

    (b) the covered international related party dealings are consistent with the previous APA

    (c) there are no material changes to functions, assets or risks for the taxpayer or, other parties to the covered international related party dealings

    (d) the transfer pricing methodology used in the previous APA remains the most appropriate

    (e) the critical assumptions are consistent with the previous APA.

161. The ATO would generally expect a taxpayer to provide the following information in its renewal APA application where it qualifies for a streamlined APA renewal process:

    (a) a written statement confirming compliance with the conditions set out in subparagraphs 160 (b), (c), (d) and (e) of this practice statement

    (b) as required, updated benchmarks to support the arm's length outcome for the APA. The ATO will assist with updated benchmarking if the taxpayer qualifies for the simplified APA process.

162. The information required for the streamlined APA renewal process is likely to be significantly less than that required where an APA renewal involves changes to the terms of the existing APA.

APA extension process

163. A process to extend an APA on the same terms is available for both unilateral and bilateral APAs, subject to the agreement of the tax treaty partner for bilateral APAs.

164. An APA extension results in the term of the existing APA being extended for a further three to five year period.

165. The APA extension process is available only where it is clear that:

(a) there have been no material changes in any matter relevant to the covered international related party dealings or to the APA terms

(b) it is unlikely that there will be material changes over the period of the renewed APA

(c) it is clear that arm's length benchmarks used for the APA remain valid for the period of the APA renewal.

166. Eligibility for the APA extension process will need to be agreed at the pre-lodgment meeting for the renewal of the APA, subject to compliance with the conditions in subparagraphs 160 (b), (c), (d) and (e) and 165 of this practice statement. The ATO generally expects a taxpayer to provide a written statement confirming compliance with these conditions.

167. The information required for the APA extension process is likely to be significantly less than that required where an APA renewal involves changes to the terms of the existing APA.

CHAPTER 10 – AUDITS AND ROLLBACKS

ATO audits and APAs

168. An APA does not exempt the taxpayer from a risk review or audit (which taken together are referred to as active compliance) of the taxpayer's business activities as a whole. However, it will not involve a re-evaluation of the acceptability of the agreed transfer pricing methodology previously agreed in the APA. The risk review or audit undertaken will follow the Commissioner's published guidelines discussed in Chapter 8 of the Large business and tax compliance 2010 booklet.

169. Any active compliance may focus on establishing whether:

(a) the terms of the APA have been properly complied with by the taxpayer

(b) the agreed transfer pricing methodology has been correctly applied

(c) the information supplied in the taxpayer's APA application and the ACR reflect accurately all material facts.

170. In the event that agreement on an APA cannot, for whatever reasons, be reached or the taxpayer withdraws from the APA process or prior years are reviewed, subsequent use may be made by the ATO of the factual information disclosed during the APA process. Non factual information such as opinions, lines of argument, judgements and conclusions about the operation and effect of the APA, rather than about facts (projected or identified) required in applying the APA, provided by taxpayers throughout the APA process will not be relevant to a subsequent audit. In an audit context the ATO would have to

develop its own analysis and conclusions about the operation and effect of the APA.

171. The fact that a taxpayer may be under active compliance does not prevent the taxpayer from applying for an APA in respect of future years. The fact that a taxpayer has applied for an APA should not generally result in active compliance in relation to the prior years being discontinued or postponed.

172. It is important to note that active compliance and the development of an APA are separate processes. They will be resolved separately unless the facts and circumstances of the APA and the review years are sufficiently similar to enable the APA results to be applied to the review years. They may have different teams working on them, although information may be shared between the active compliance team and the APA team.

173. Where active compliance is in progress and a taxpayer requests an APA, the review of the issues relevant to the APA may be held in abeyance if it is agreed by all parties that the APA will assist with the completion of the process. Although an APA can only apply to future years, where the facts and circumstances surrounding the APA and the active compliance years are sufficiently similar, the APA information, analysis and resulting transfer pricing methodology may be helpful in determining the issues.

174. The decision to continue with, hold in abeyance or cease the active compliance process or part of it will be made by the audit case manager and the APA case leader or Competent Authority in a bilateral APA who will consider the facts and circumstances of the particular case. This decision would be based on the advice and recommendations of the APA team.

175. A number of factors should be considered in deciding how the APA and audit processes should be coordinated, including:

(a) the cooperation and assistance offered by the taxpayer to finalise both the APA and active compliance

(b) the stage of the active compliance (that is, how far it has progressed and how close it is to finalisation)

(c) the issues in question, both in the active compliance and the APA request

(d) the similarities or otherwise between the facts and circumstances surrounding the years under review and the APA request

(e) the relevance of information and documentation submitted as part of the APA application to the prior years

(f) whether there is likely to be any significant differences between the results of the active compliance and the APA and the reasons for such differences

(g) whether it is possible to finalise part of the active compliance, leaving the issues which are related to the APA in abeyance

(h) whether conclusion of the APA will assist in concluding the active compliance

(i) whether the taxpayer can produce an outline of the APA showing timelines that will be met.

176. It may be appropriate in some cases to defer some part of the active compliance for a short period pending completion of the APA. However, finalisation of that part of any review could recommence, with written notice to the taxpayer, at any time, at the discretion of the ATO. Alternatively, the ATO may suggest the taxpayer defer the lodgement of the APA application until the ATO is ready to

state its position on an issue so that the taxpayer's application can fully and completely respond to the ATO's concerns.

177. At any time where active compliance has been held in abeyance, wholly or partially, and the ATO has reason to believe that the APA is not proceeding in the best interests of finalising the review, the ATO may, with written notice to the taxpayer, recommence the active compliance. If any double tax implications arise as a result of the audit, the mutual agreement procedures of the relevant tax treaty should be used to resolve the matter.

178. Where it is agreed to hold the entire audit or part of it in abeyance pending the outcome of the APA, any adjustments made to the assessments of the audit years using a transfer pricing methodology or other information from the APA will not constitute a voluntary disclosure in advance of audit. Once active compliance has commenced and the ATO has made contact with the taxpayer or their representatives normal penalty provisions apply to any adjustments made to those assessments under review[17].

Rollback of transfer pricing methodology/prior year examination

179. The ATO approach to the rollback of transfer pricing methodology to prior years of income or examination of prior years will depend on the circumstances of the taxpayer.

180. APAs are prospective, however, where prior year transfer pricing issues arise they should be treated as a collateral issue to the APA. The ATO can envisage situations where the principles developed in concluding an APA might provide a reasonable agreed basis for resolving issues raised in prior year reviews, as well as past years not yet under review. This would depend on the availability of all relevant information in respect of the prior years and whether there are any changes in the taxpayer's circumstances or the process by which it will be worked out. The APA case leader, the audit case manager and taxpayer should agree how and when the prior years' issues should be resolved in the APA process.

181. Where, as a result of providing information for an APA there is a need to amend a prior year return, any amendment will be treated as though the taxpayer had made a voluntary disclosure, provided active compliance has not already been commenced, or the ATO had not previously made contact with the taxpayer or their representative(s) with respect to the prior year returns. Where active compliance has not commenced, additional penalty taxes, if any, will be calculated on the basis of a voluntary disclosure having been made by the taxpayer in relation to each prior year. Where active compliance has commenced, the normal penalty provisions apply to any adjustments made to those years under review.

182. The following points have therefore been incorporated into ATO practice for APA rollbacks:

(a) the ATO will not give an undertaking that years prior to an APA will not be reviewed or audited

(b) an APA does not have retrospective application

(c) there may be situations where the principles developed in concluding an APA might provide a basis for resolving issues for prior years (see 175 (d) to (f) in the Section – ATO Audits and APAs)

[17] See further TR 98/16 which discusses international transfer pricing - penalty tax guidelines.

(d) prior year adjustments resulting from an APA request will be treated as though the taxpayer has made a voluntary disclosure provided active compliance has not already commenced or been notified

(e) where active compliance has not already commenced or been notified, any additional penalty taxes, will be calculated on the basis of being a voluntary disclosure

(f) where active compliance has commenced, the normal penalty provisions apply to any adjustments made to prior years under review.

183. The decision whether the ATO will seek rollback for years prior to an APA is made on a risk assessment basis. As a general rule, it may be expected that the ATO will not seek rollback where prior year transfer pricing issues are considered low risk, while it is likely that rollback will be sought for high risk cases.

184. As a general rule, the ATO will be more likely to seek rollback for a lesser number of years in the case of a voluntary APA request than it would for a case resulting from ATO compliance activity.

CHAPTER 11 – ADMINISTRATION OF APAS

Management of APAs

185. The differentiated APA Program allows the ATO to prioritise its allocation of transfer pricing resources according to the complexity and risk of the covered international related party dealings and collateral issues. The ATO Transfer Pricing Operations Group[18] allocates transfer pricing casework to the most appropriate APA case leader based on the complexity of issues under review.

APA Team Structure

	APA Products			
	Simplified	Standard		Complex
Types of APA Products	Unilateral	Unilateral	Bilateral	Unilateral/ Bilateral
APA Case Leader	✓	✓	✓	✓
Case Officer	✓	✓	✓	✓
Economist	✓	✓	✓	✓
APA Specialist/Competent Authority			✓	✓

APA case leader

186. The APA case leader will be a 'specialist' from the Transfer Pricing Network[19] and have sufficient technical transfer pricing expertise and project management capabilities to run the APA.

[18] The Transfer Pricing Operations Group (TPOG) oversees the implementation of strategies to manage transfer pricing risks and is responsible for allocating and overseeing active compliance case work, identifying transfer pricing risks, selecting cases for active compliance and capability development initiatives.

[19] The Transfer Pricing Network is a network of ATO personnel capable of undertaking transfer pricing work.

187. The roles and responsibilities of the APA case leader include:

(a) communicating the ATO position, reasoning and status of the APA application to the taxpayer

(b) being accountable for actively managing the case, ensuring milestones and timeframes for each phase of the five steps of the APA process are met, and that quality assurance and reporting requirements are complied with

(c) referring the APA to a TPRP at key milestones, such as the acceptance of the case, agreement of the scope, selection of the most appropriate transfer pricing methodology and resolution of collateral issues

(d) involving technical specialists as early as possible, for example, the Economist Practice, Special Advisors, Jurisdictional Income Practice, Centres of Expertise and Tax Counsel Network

(e) co-ordinating the resolution of any collateral issues with the APA process

(f) developing an APA case plan in consultation with the taxpayer/advisor

(g) escalating any significant blockers and delays to senior officers for resolution

(h) approving the terms of unilateral APAs.

The APA case officer

188. The APA case officer has carriage of the day to day activities of the APA, and is required to assist the APA case leader and economist, contribute industry expertise, and deal with non-transfer pricing issues that arise in the case.

The economist

189. An economist from the ATO's Economist Practice provides economic advice to the APA team on transfer pricing matters including determining the characterisation of the transactions/business via a functional analysis, advice and analysis on transfer pricing methodologies, and analysis of comparability and benchmarking techniques. The economist also provides input on industry features that are relevant to reliably applying the arm's length principle.

The APA specialist/Competent Authority

190. The APA specialist provides transfer pricing advice and technical direction to the APA case team and ensures consistency with wider ATO practice. For bilateral APAs a Competent Authority delegate would perform the APA specialist role and negotiate the terms of the APA with the tax treaty partner in addition to providing technical advice.

191. In bilateral APAs the Competent Authority delegate is the official designated to approve the terms of the agreement of a bilateral APA. The APA case leader is responsible for coordinating the input of the economist, the initial drafting of position papers and the terms of the APA for the approval of the Competent Authority delegate. The Competent Authority delegate negotiates the terms of the APA with the tax treaty partner.

Quality assurance of APAs

192. ATO processes ensure that common transfer pricing issues are dealt with consistently through a controlled APA allocation process and that appropriate specialists are involved from the outset in complex APAs. TPRPs review the technical and case management decisions in APAs and ensure that the principles and practices in ATO transfer pricing rulings and other guidance are followed.

193. The ATO will ensure that all APAs are subject to TPRPs at key milestones throughout the APA process, such as:

    (a) a decision whether to accept, or not accept an APA

    (b) a decision whether to withdraw from an APA

    (c) at the conclusion of the Analysis and Evaluation step.

Independent circuit breaker/review mechanism

194. The ATO has established an internal independent circuit breaker/review mechanism which can be requested by the taxpayer.

195. In the first instance, the APA case leader and taxpayer should make every attempt to resolve any difficulties, anomalies or disputes which may have arisen in the APA process. The agreed APA case plan should facilitate this outcome.

196. A taxpayer can seek an internal review in situations where:

    (a) the ATO does not accept an APA proposal

    (b) the ATO and taxpayer cannot reach agreement on the scope of the APA

    (c) the ATO withdraws from the APA

    (d) a standstill has been reached in the APA process.

197. In situations subparagraphs 196 (a) to (c) the ATO will communicate its intention to the taxpayer and explain its reasons. The taxpayer can then respond if they disagree with the ATO's decision.

198. Also, where a standstill has been reached (situation subparagraph 196 (d)) the taxpayer has the opportunity to have the ATO's processing of an APA reviewed. There may be a number of reasons for a standstill including, but not limited to, a fundamental difference on key issue(s).

199. In all cases the Head of the APA Program will review the matter, either personally or by referring it to a senior officer for review. The taxpayer will be advised of the ATO decision.

Omission or false or misleading statements

200. The ATO would seek to either review, revise or cancel an APA where a taxpayer makes a statement that is false or misleading, or omits from a statement any matter or thing without which the statement is false or misleading, in either the APA application or any other submission, report, information or documentation regarding or supporting the APA application. Such action would occur irrespective of whether the false or misleading statement (or omission) is made due to an honest mistake or is made carelessly, recklessly, knowingly or fraudulently. Generally speaking, an APA would only be cancelled if the false or misleading statement (or omission) related to a material particular. In addition to cancelling the APA, the ATO may amend the taxpayer's returns and impose appropriate penalties. Obviously, such adjustments would be subject to the usual objection and appeal provisions of the law.

CHAPTER 12 – TRANSFER PRICING RISK ASSESSMENT PRODUCTS

201. The ATO risk assessment and self assessment risk products are available to Small & Medium Enterprises (SME) and Large Business taxpayers who require a level of assurance as to the ATO view of their transfer pricing risk without the cost and time associated with undertaking an APA.

ATO risk assessment

202. This product is available to taxpayers wishing to obtain some degree of assurance from the ATO as to its views on their transfer pricing risk. It may be particularly useful where a taxpayer undertakes a one off international related party dealing or dealings that have a limited life (for example a construction project covering a one to two year period) where an APA may not be a viable option.

203. Taxpayers can submit their request (including a copy of their documentation) to the Transfer Pricing Gatekeeper (see Chapter 1). The ATO will evaluate the quality of the taxpayer's documentation and the commerciality of outcomes achieved in order to determine the risk of a transfer pricing audit following the process outlined in TR 98/11.

    The ATO will then provide the taxpayer with:

    (a) a completed checklist evaluating the level of quality of the transfer pricing documentation

    (b) a letter advising the ATO's views on the commerciality of outcomes of the arrangements and the taxpayer's risk of a transfer pricing audit by the ATO on the international related party dealings concerned.

Self assessment risk product

204. The ATO has also developed a Self Assessment Risk Product for taxpayers to evaluate their own level of transfer pricing risk. This product includes a documentation evaluation checklist and uses the 'Risk of an ATO Audit of Transfer Pricing Outcomes' chart from paragraph 4.27 of TR 98/11 to arrive at a transfer pricing risk rating.

205. This product is designed primarily for use by taxpayers with less complex transfer pricing arrangements and lower levels of international related party dealings. It is most suitable for companies with a single line of business (for example, distributors or service providers) where transfer pricing arrangements may be viewed on a 'whole of entity' basis.

206. This product will assist taxpayers to obtain some level of certainty and assurance that their international related party dealings are being conducted in accordance with the arm's length principle for tax purposes.

207. The ATO has developed this product for taxpayers with annual turnovers less than $250 million or other companies with low levels of international related party dealings. Where a company has high levels of international related party dealings or complex or multifaceted transfer pricing arrangements in place it will be more appropriate to consider one of the alternative products available from the ATO.

208. While the guidance in this product is designed to enable a taxpayer to accurately test and evaluate the adequacy of its transfer pricing documentation processes and the commercial realism of outcomes in line with the four steps recommended in TR 98/11 to establish the risk of an ATO audit of transfer pricing outcomes, the ATO cannot guarantee that it will ultimately agree with the documentation quality rating reached by a taxpayer using this product or the transfer pricing risk rating.

APPENDIX 1 – PRE-LODGMENT MEETING AGENDA

1. The process for testing compliance with the arms length principle in the context of an APA will be discussed with the taxpayer so that they understand the APA process as a whole. A part of this process is to establish the most appropriate methodology which will be done in the Analysis and Evaluation step (step 3).

2. The suggested agenda is as follows:

Background to the process

(a) confirmation of the non-binding nature of the pre-lodgment meeting

(b) key principles of the APA product:

- purpose of the APA Program
- mutual expectations
- circuit breaker/review mechanism
- the five steps of the APA process
- exchange of information and communication

(c) the need to deal with any collateral issues.

Specific matters to be agreed

(a) unilateral or bilateral APA

(b) new or renewal APA

(c) whether the simplified, standard or complex APA process applies

(d) the term of the APA.

The process

(a) accurately characterise the international related party dealings between the associated enterprises in the context of the taxpayer's business:

- explanation of the company's position in the industry
- explanation of the business model adopted by the company and identifiable/foreseeable changes over the APA period. In the case of a business restructure, changes to existing arrangement, details of the key changes to existing activities of the parties to the dealings
- explanation of the ownership structure
- capital structure of the business
- a description of:
  - the size, nature and value of the covered international related party dealings
  - the identity of the other parties
  - the nature of the international agreements

- a description of functions undertaken, assets used and risks assumed
- how are the company's operations to be characterised?

(b) Select the most appropriate transfer pricing methodology or methodologies:

- the methodology proposed
- the profit level indicator that is being proposed
- the likely source of comparable data.

(c) Apply the most appropriate method and determine the arm's length outcome:

- the process by which any necessary adjustments to the results may be made (compensating adjustments)
- secondary tests of the reliability of the primary result
- likely outcomes from the methodology
- proposed form and structure of the APA
- proposed critical assumptions
- forecast and 'hindcast' the financials using the method
- roll back of the APA methodology
- any other collateral issues
- processes and timetable.

3. Where there are intangible and intellectual property issues the following matters also need to be considered:

(a) It is widely recognised that intangible and intellectual property can present particular problems when examining comparability, usually because of the specialised nature of such property and unique aspects of any particular property of this kind.

(b) The covered international related party dealings of APAs often include intangibles such as knowledge/know-how, business and IT systems, processes and procedures, specifications, trademarks, trade names and branding. Some elements may be protected by trademarks, registration and copyright and others by confidentiality agreements or requirements.

(c) In these types of cases the ATO spends time ensuring that the intangibles are clearly identified before the rewards for their use are determined. The ATO has found it necessary to establish the existence and nature of the intangibles before attempting to attribute to them any value or take them into account in applying an arm's length methodology.

(d) Questions the ATO is likely to ask about the intangible are:

- What is the property?
- Is the property protected?
- How is it documented?
- How is it transferred or used and what are the contractual terms?

- Who developed the intangible?
- How is it used in the business?
- How does it add value to the business?
- How has it been valued?

(e) These key questions will help identify and articulate what the intangible is, how it is used in the business and how it adds to profitability. These questions are consistent with Chapter VI of the *2010 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*.

(f) While it can be expected that valuable intangibles which contribute significantly to profit will receive greater reward, the ATO also considers the reasonableness of the proposal by looking at the outcome of the international related party dealings from the perspective of each party to the dealings in accordance with the arm's length principle.

Subject references	advance pricing arrangement mutual agreement procedure exchange of information transfer pricing international
Legislative references	ITAA 1936 8 ITAA 1936 262A ITAA 1936 Pt III Div 13 TAA 1953 Sch 1 Div 355
Related public rulings	TR 98/11; TR 98/16
Related practice statements	PS LA 1998/1
Case references	
Other references	Applying the Arm's Length Principle Large business and tax compliance 2010 booklet Taxation treaty
File references	1-2FFLRD9
Date issued	17 March 2011
Date of effect	17 March 2011
Other Business Lines consulted	Small & Medium Enterprises